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No. 659

In the Supreme Court of the United States

October Term, 1962

ATTORNEY GENERAL OF ILLINOIS, PETITIONER, *pro hac vice*

v.

ROBERT M. KEVISER, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 498

ADELHEIT VON HARDENBERG, IRMGARD VON ALTEN AND IRMGARD VON SCHILLER, PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decree of the Circuit Court of Cook County, is unreported (see Pet. App. 37–40). The opinion of the Appellate Court of Illinois (Pet. App. 18–35) is reported at 29 Ill. App. 2d 75, 172 N.E. 2d 413. The opinion of the Supreme Court of Illinois (Pet. App. 1–17) is reported at 25 Ill. 2d 151, 183 N.E. 2d 505. At times prior to the present petition, the title of this cause was *Orme* v. *Northern Trust Co.*

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on May 25, 1962. A petition for rehearing was denied on July 12, 1962.[1] The petition for a writ of certiorari was filed on October 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether future interests in real property are subject to vesting by the Attorney General under Section 7(c) of the Trading With the Enemy Act, 50 U.S.C. App. 7(c).

STATUTE INVOLVED

Section 7(c) of the Trading With the Enemy Act, 50 U.S.C. App. 7(c), provides in pertinent part:

> (c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing and belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the

[1] The Supreme Court of Illinois granted petitioners' motion for a stay of mandate pending the outcome of the present petition for a writ of certiorari (Pet. App. 36).

Alien Property Custodian, or the same may be seized by the Alien Property Custodian * * *.

STATEMENT

This action was commenced in 1943 to construe, under the applicable laws of Illinois, the will of Louisa G. Bigelow. Petitioners Von Hardenberg and Von Alten, nationals of Germany, were beneficiaries under the will and were parties defendant in the action.[2] The Attorney General, as successor to the Alien Property Custodian, issued vesting orders in 1949 seizing their interest in the trust created by the Bigelow will, and successfully moved to have himself substituted as their successor in interest.[3]

While the main action was pending in the lower court, petitioners sought review of the order permitting the Attorney General's participation. The Supreme Court of Illinois stated that the issue was the power of the Attorney General to seize or vest "the fee or interests" of foreign nationals during a period when, although a state of war continued to exist, actual hostilities had ceased. It held that, despite the cessation of the "shooting war", the existence of a formal state of war was sufficient to authorize the taking by the Attorney General. *Orme*

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[2] The third petitioner, Irmgard Von Schiller, is the daughter of petitioner Von Alten and the neice of petitioner Von Hardenberg. She appears in this case on behalf of her mother and aunt pursuant to a power of attorney executed by them.

[3] The original vesting order, in which petitioners Von Hardenberg and Von Alten are expressly named, is No. 13022, 14 F.R. 1660. This was supplemented by Vesting Order No. 13192, 14 F.R. 2227. Both were issued in 1949.

v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E. 2d 335, certiorari denied *sub nom. Von Hardenberg* v. *McGrath*, 343 U.S. 921.

Thereafter, the main action was prosecuted through the courts of Illinois. Ultimately, the Supreme Court of Illinois held, *inter alia*, that it had upheld the effectiveness of the 1949 vesting orders in its 1951 decision, thus rendering a second adjudication of the question unnecessary; that, in any event, petitioners Von Hardenberg and Von Alten, as daughters of one of the testatrix's grandchildren, held remainder interests in a portion of the trust; that they had acquired these interests in the estate at the time of their mother's death in 1941, albeit enjoyment of the property was postponed until 1951, when the last of the testatrix's grandchildren died; and that the Attorney General had properly vested these remainder interests in 1949. 25 Ill. 2d 151, 183 N.E. 2d 505.

Petitioners now seek review by this Court of that part of the judgment below approving the Attorney General's vesting of their remainder interests. They argue (1) that the 1951 decision of the Supreme Court of Illinois did not adjudicate the question now in controversy, and (2) that the Attorney General cannot vest a future interest in real property, but must await actual possession of the property by the remainderman.

ARGUMENT

Even if we assume with petitioners that they are not foreclosed by an earlier decision of the Illinois courts in this litigation, it is apparent that the ques-

tion which they would present on the merits has been long settled against them. The Custodian, it is well established, has power to seize any species of enemy property, future interests no less than possessory ones.

Petitioners do not challenge the proposition that the Custodian, in 1949, had the power to seize any of their property which had been subject to vesting prior to January 1, 1947. This, of course, is not open to debate. The Joint Resolution of Peace between the United States and Germany, 65 Stat. 451, adopted on October 19, 1951, provided that:

> *any property* or interest which prior to January 1, 1947, *was subject to vesting or seizure* under the provisions of the Trading With the Enemy Act of October 6, 1917 * * * as amended, *or which has heretofore been vested or seized* under that Act * * * *shall continue to be subject to the provisions of that* Act in the same manner and to the same extent as if this resolution had not been adopted * * *. [Emphasis added.]

Rather, they contend (Pet. 17–18) that they acquired their interests in the Bigelow trust in 1951 and that therefore the Custodian's 1949 order did not encompass their interests.

If petitioners mean to suggest that, as a matter of Illinois law, they had no property in 1949, the short answer is that the Supreme Court of Illinois has conclusively decided that question against them. It held (Pet. App. 12):

> While the trust was to continue until the death of the last surviving granddaughter, [peti-

> tioners'] interests in the estate were acquired on the death of their mother in 1941. At that time they were not only entitled to the income from her share, but they acquired their proportionate share of the equitable fee in the estate. The fact that it was postponed in enjoyment pending the duration of the trust did not affect its acquisition or its indefeasibility as of that time. * * * [4]

If, on the other hand, the argument is that the Trading With the Enemy Act authorizes only the seizure of possessory interests, the answer is that neither the statute nor forty-odd years of case law leaves any room for this contention. Section 7(c) (*supra*, p. 2), which was adopted as part of the original 1917 Act, provides comprehensively for the seizure of—

> any money or other property, including * * * rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy * * * [5]

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[4] The Supreme Court of Illinois held that, under the Bigelow will, each of the testatrix's granddaughters had been granted a life estate, with remainders to the children or issue of each—including petitioners Von Hardenberg and Von Alten. See Pet. App. 10–14. Under Illinois law these remainders were "vested" in the real property sense. *E.g.*, *Kost* v. *Foster*, 406 Ill. 565, 94 N.E. 2d 302; *Henry* v. *Metz*, 382 Ill. 297, 46 N.E. 2d 945; *Lewin* v. *Bell*, 285 Ill. 227, 120 N.E. 633; see also Annot., 57 A.L.R. 2d 103, 113. Such vested remainders are recognized as valuable marketable property in Illinois. *E.g.*, *McDonough County Orphanage* v. *Burnhart*, 5 Ill. 2d 230, 240, 125 N.E. 2d 625, 631–632.

[5] Section 5(b), 50 U.S.C. App. 5(b), adopted during World War II to authorize the regulation and seizure of the property

In the early leading case of *Kahn* v. *Garvan*, 263 Fed. 909 (S.D. N.Y.), Judge Learned Hand observed (p. 917), "The purpose was to accomplish a swift, certain, and final reduction to possession of vast quantities of property involved in incredible complication of ownership and interest." As he further stated (*id.*, p. 914), "The general terms were used to include all kinds of property" and cover, *inter alia*, interests in trusts and property held as security. This Court declared a generation later, in World War II, that "[e]very resource within the ambit of sovereign power" is subject to taking under this war measure. *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 476. Again, in *Propper* v. *Clark*, 337 U.S. 472, the Court emphasized that a purpose of this country's "freezing" regulations was to preserve the status of *all* foreign interests in property subject to our jurisdiction so that the Custodian might identify and, in his discretion, vest those interests which were found to be enemy-tainted. If the purpose of the Act had been merely to forestall enemy utilization of such property, there might be more force to the suggestion that the Act should not be read to reach future interests in property.[6] The statute, however, had the much broader purpose of authorizing the sequestration of enemy property for purposes of this

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of any foreign national, provides in similar vein for the vesting of "any property or interest of any foreign country or national thereof." See, generally, *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480.

[6] On that assumption, there would have been no need to supplement the "freezing" power with the "vesting" power.

country's affirmative use, including reparations. *Ibid; Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480.

Not surprisingly, then, the courts have uniformly sustained the taking of property which falls within the category of "future interests." See, *e.g., Application of Miller,* 288 Fed. 760 (C.A. 2); *Kammholz* v. *Allen,* 256 F. 2d 437 (C.A. 2); *Herrmann* v. *Rogers,* 256 F. 2d 871 (C.A. 9), vacated and remanded, 358 U.S. 332, adhered to on remand, 274 F. 2d 843, certiorari denied, 364 U.S. 821; *Rogers* v. *Hartford-Connecticut Trust Co.,* 165 F. Supp. 116 (D. Conn.); *Von Bredow* v. *United States,* 169 F. Supp. 256 (Ct. Cl.); *Schieb* v. *United States,* 173 F. Supp. 611 (Ct. Cl.); *In re Zuber's Estate,* 146 Cal. App. 2d 584, 304 P. 2d 247; *Miller* v. *Lautenburg,* 239 N.Y. 132, 145 N.E. 907; *In re Bendheim's Estate,* 124 Misc. 424, 209 N.Y.S. 141, affirmed, 214 App. Div. 716, 209 N.Y.S. 794.[7]

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[7] As petitioners' own discussion reveals (Pet., pp. 11–16), neither *GMO. Niehaus & Co.* v. *United States,* 170 F. Supp. 419 (Ct. Cl.), nor *In re Paszotta's Trust,* 172 N.E. 2d 904 (Ind. App.), holds that future estates in property are beyond reach of the federal vesting power. Both of these cases turn on the question whether, as a matter of property law, the enemies had anything as of the critical date. As observed earlier, the Illinois Supreme Court has concluded in the instant case that under Illinois law petitioners acquired interests in the Bigelow trust in 1941.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

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NOVEMBER 1962.